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The Louisiana Lottery-Supreme Court Style: A Look at State v. Simpson' and its Constitutional Mandate of Random Allotment of Criminal Court Cases Within a District

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The Louisiana Lottery—Supreme Court Style: A Look at *State v. Simpson*[1] and its Constitutional Mandate of Random Allotment of Criminal Court Cases Within a District

Criminal defense attorneys, in their infinite struggle to find new procedural infirmities, have struck gold in a recent Louisiana Supreme Court opinion. The procedural loophole unearthed by the court is valuable to defense attorneys because it strikes at the precepts of the court's involvement in criminal adjudication, that is, how the criminal cases are allocated among the different divisions of a judicial district. No longer do district attorneys have the luxury of setting the criminal dockets of each division within a district. Now rather, criminal cases, like civil cases, must be allocated by lot to the different judges within each district.

In a short per curiam opinion, *State v. Simpson* (*Simpson II*),[2] the Louisiana Supreme Court held that due process requires capital and other felony cases to be "allotted for trial to the various divisions of the court, or to judges assigned criminal court duty, on a random or rotating basis or under some other procedure adopted by the court which does not vest the district attorney with power to choose the judge to whom a particular case is assigned."[3] In other words, any Louisiana trial court system whereby the district attorney has any discretion whatsoever over which judge within a district is assigned a capital or felony case is "facially unfair"[4] and violates due process.[5]

When the dust settled and the smoke cleared, it appeared that the *Simpson II* decision espoused a very equitable rule. In fact, at first glance, it seems only fair that the district attorney not be allowed to choose the judge to preside over a felony or capital case. The problem, however, is that the *Simpson II* rule was not fully thought out and thus, not fully developed, leaving some Louisiana judicial districts with fragmented criminal systems. The main criticism of the rule laid down

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1. 551 So. 2d 1303 (La. 1989) (hereinafter referred to as *Simpson II* as this is the supreme court's opinion on rehearing. The original opinion is hereinafter referred to as *Simpson I*).

2. Id.

3. Id. at 1304.

4. Id.

5. Further, the court in *Simpson II* also held that in order to meet due process requirements the criminal court dockets within each district must indicate the order in which cases are to be called for trial on a particular day. Id. at 1305.

in *Simpson II* was that though it was seemingly fair, it was perhaps not based on the proper authority. In *Simpson II*, the supreme court based random allocation of criminal cases on the due process requirement of the Louisiana and United States constitutions. Due process requires a fair tribunal. Since the criminal justice system is presumably based on *all* tribunals being fair and impartial, how can due process be violated by selective allocation of a criminal case to a certain court within a district? The allocation of cases within a district should perhaps instead be left to each judicial district or uniformly set out by the Louisiana Legislature rather than being based on some nebulous due process test.

This casenote will attempt to analyze the first and second *Simpson* opinions as well as other related jurisprudence. Further, inquiry shall be made into the potential practical problems of the *Simpson II* rule. And finally, this note will provide more acceptable alternatives to the *Simpson II* rationale.

I. PRE-*SIMPSON*

The constitutionality of allotment of criminal court cases within a district was first raised in the 1988 court of appeal case *State v. Authement*.[6] In an otherwise unrelated case, the court in *Authement* noted in a footnote that one of the defendant's twenty-three assignments of error was that the court *lacked jurisdiction* because of improper allotment of criminal cases.[7] The issue was never decided, however, because the court reversed the convictions on other grounds.[8] The *Authement* case thus planted a seed of doubt in many defense attorneys' minds concerning the constitutionality of a judicial district system whereby the judge who will preside over a felony or capital case is not selected randomly.[9]

The allotment issue was presented again in *State v. Tassin*,[10] a case decided by the Louisiana Supreme Court. However, the issue was skirted for the second time because the court's discussion of the propriety of the allotment procedures was put in an appendix not designated for publication, and therefore, does not appear in the official reporters for

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6. 532 So. 2d 869 (La. App. 1st Cir. 1988).

7. Id. at 871 n.3(3)(b). Note that subsequent cases do not assert lack of jurisdiction because of improper allotment, but rather unconstitutionality under due process standards.

8. Id. at 871-72.

9. It is unknown exactly how the thirty-second judicial district allotted its criminal cases at the time of the alleged impropriety. The local court rules for the thirty-second judicial district court applicable at the time provided for a random lottery allotment of civil court cases. See Louisiana Rules of Court, State, Rules of the Thirty-second Judicial District Court, Rule 2 (West 1988). The Rules had no provisions concerning the allotment of criminal court cases within the district.

10. 536 So. 2d 402 (La. 1988), cert. denied, 493 U.S. 874, 110 S. Ct. 205 (1989).

all to see.[11] *Tassin* did not deal directly with normal allotment procedure; rather, the issue came up upon reallotment of criminal cases after two divisions of the Louisiana Twenty-fourth Judicial District Court were removed from the allotment pool. The defendant's case was originally allotted to division "B" of the twenty-fourth judicial district court. However, when the court amended its local rules to take division "B" out of the allotment system, the defendant's case had to be reallotted to a different division. All division "B" cases involving defendants who were incarcerated at the time of the amendment were automatically assigned to division "J." All other division "B" cases were allocated by random drawing. The defendant in *Tassin* had been automatically reallocated to division "J" because he was incarcerated at the time. He objected, claiming the non-random allotment of his case violated the *Equal Protection Clause* of both the United States and Louisiana constitutions.[12] The court in this unpublished appendix held that the *Constitution was not violated* because "no matter which division the case was allotted to, it would still have been decided by a jury drawn from the general venue."[13] Citing no authority and giving no reasoning other than in the above cited quote, the court summarily rejected the defendant's claim. Apparently, the rationale was that the system of allotment of the judge to the case was irrelevant because the defendant's right to a jury trial with a jury drawn from the general venue was met in any case.[14]

Several months after *Tassin*, the Louisiana Third Circuit Court of Appeal confronted the constitutionality of a non-random allotment procedure for criminal cases within the Louisiana Fifteenth Judicial District Court.[15] In *State v. Trahan*, a case which the Louisiana Supreme Court would later overrule in *Simpson II*,[16] the court of appeal upheld the trial court's denial of defendant's "motion for random allotment." The defendant argued that the system used to allocate criminal cases within the fifteenth judicial district court was inherently unfair because it allowed the prosecution to "'forum shop' for a sympathetic trial judge."[17]

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11. Although the appendix is not published in the official reporters, it is available at the end of the opinion on Westlaw.

12. *Tassin*, 536 So. 2d at 402. Note again that the defendant's claim here was not the same as the claim found in *Simpson*. The defendant here argued a violation of his equal protection rights as opposed to *Simpson*'s due process claim.

13. Id.

14. *Tassin* is clearly inconsistent with a broad reading of the results and reasoning found in the *Simpson* decision to be discussed later in this note.

15. State v. Trahan, 543 So. 2d 984 (La. App. 3d Cir. 1989), overruled by State v. Simpson, 551 So. 2d 1303 (La. 1989), modified and aff'd by State v. Trahan, 576 So. 2d 1 (La. 1990).

16. *Simpson*, 551 So. 2d at 1304. In footnote 3 the court held that State v. Trahan was overruled insofar as it conflicted with the *Simpson* order.

17. *Trahan*, 543 So. 2d at 989.

The fifteenth judicial district court at the time of *Trahan* and *Simpson I and II*, also a fifteenth judicial district court case, had no published local rule of court providing for allocation of criminal cases.[18] However, unofficially, the understanding was that the coordinator for the district attorney's office would set the case on the docket which would be most efficient.[19]

In *Trahan*, a well-reasoned third circuit opinion, the court, addressing the defendant's statutory argument, held that the allocation of criminal cases within each judicial district is purely procedural. The third circuit correctly noted that as to *procedural* matters in cases before a district court each judicial district is expressly empowered by statute to adopt local rules for the conduct of business in civil as well as criminal cases.[20] The court did acknowledge that this rule is not absolute, however. The district court's express right to adopt local rules as to procedural matters before it is limited if there is "specific legislative procedural rules to the contrary."[21] Therefore, unless the legislature had created a uniform requirement for allocation of criminal cases within a judicial district, which they had not, then each judicial district was statutorily empowered to create any allocation procedures it deemed effective; even if that procedure was to leave the allocation up to the district attorney. As for the possibility of a constitutional violation, the third circuit found nothing on the record which showed that the allotment system in any way denied the defendant any constitutional rights. Therefore, the court dismissed this assignment of error.

The third circuit noted in *Trahan* that the fifteenth judicial district court, because it was made up of eleven judges rotating between three parishes, had opted not to implement a rule for random allotment of criminal cases, because random allotment would limit the district attorney's statutory right to decide *when* a case is prosecuted. The third circuit implied that the district attorney's statutory right to decide when a case is prosecuted comes from Louisiana Code of Criminal Procedure article 61, which provides: "The district attorney shall have entire charge and control of every criminal prosecution instituted or pending in his district, and determines whom, when, and how he shall prosecute."

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18. See Louisiana Rules of Court, State, Rules of the Fifteenth Judicial District Court (West 1989).

19. This information was elicited from the coordinator for the district attorney of the fifteenth judicial district court and was affirmed as of the publication of this note.

20. State v. Trahan, 543 So. 2d 984, 989 (La. App. 3d Cir. 1989). See La. R.S. 13:472 (1983), which states that "[e]ach district court may adopt rules for the conduct of business before it." See also La. Code Crim. P. art. 18, which states, "A court may adopt rules for the conduct of criminal proceedings before it."

21. *Trahan*, 543 So. 2d at 989. See also State v. Eros Cinema, 262 La. 706, 264 So. 2d 615 (1972).

From a strict reading of article 61, however, it seems the third circuit misconstrued the right which the district attorney is given. Article 61 appears to mean, given its fair import, that the district attorney is given full discretion as to when he files a bill of information or when he indicts on behalf of the state, but not the right and discretion as to when the judicial branch shall actually hear the case. However, overlooking this misstatement, the gist of the third circuit's opinion is plausible in that the allotment of cases within the district is procedural, and as such, it can be provided for as the district court sees fit, even if the court leaves it to the district attorney.[22]

More importantly, the third circuit in *Trahan* noted what was later to be a fundamental weakness of the *Simpson II* rationale. If the defendant's concern is that the trial judge is somehow biased to the extent he could not "conduct a fair and impartial trial,"[23] the state provides the defendant a remedy elsewhere. The defendant has at his access the right to file a motion to recuse under Louisiana Code of Criminal Procedure article 671 as the appropriate remedy for a biased or prejudiced judge.[24] Under this reasoning, it is hard to accept an argument that a defendant has been denied a fair and impartial trial because the judge within the district was not randomly allotted the defendant's case. The judicial system of criminal justice is premised on the assumption that the judiciary is neutral, and if for some reason a particular division is not neutral, the defendant has a right to have the judge of that division recuse himself. Therefore, as will be alluded to later, there is a statutory remedy for a defendant's argument regarding prejudice of a judge, no matter what the allocation procedure is.

II. *SIMPSON I* AND MOUNTING PROBLEMS

The sound reasoning found in the third circuit's *Trahan* opinion would prove to be short lived, however.[25] Two months after *Trahan* was decided by the third circuit, the supreme court handed down the first *Simpson* (*Simpson I*) decision.[26] This one-paragraph decision merely held that the case was remanded to the fifteenth judicial district court, which must reassign the case under a method of allotment which does

22. See supra note 20 and accompanying text. The more accurate authority, however, is La. R.S. 13:472 (1983) and La. Code Crim. P. art. 18, and not La. Code Crim. P. art. 61.

23. *Trahan*, 543 So. 2d at 990.

24. Id.

25. The portion of the third circuit opinion which dealt with the constitutionality of the method of allotment of criminal cases was overruled in State v. Trahan, 576 So. 2d 1, 5 (La. 1990) and State v. Simpson, 551 So. 2d 1303, 1304 n.3 (La. 1989).

26. State v. Simpson, 545 So. 2d 1047 (La. 1989).

not allow the district attorney to select the judge and under a system where the trial dates are approved by the court.[27]

This opinion proved to be very confusing. The local court rules at the time provided no method of allocation of criminal matters between the different divisions of the fifteenth judicial district. The district attorney's office, which had been vested with the authority by the court to set the court's criminal case dockets so that criminal cases could be efficiently and expeditiously disposed of, now was left with no way to get a case to trial before prescriptive periods ran. Therefore, the *Simpson I* decision left the district attorney in an impossible position: needing cases to be set on the court's dockets before prescription ran, yet being told to keep his hands off the court's dockets.

After *Simpson I*, yet prior to the supreme court's rehearing opinion in *Simpson* (*Simpson II*), the third circuit was once again faced with a defendant who claimed that the allocation procedures of the fifteenth judicial district court were unconstitutional.[28] In *State v. Romero*, the defendant argued that because the fifteenth judicial district court had a random allotment set up for civil cases, it was unconstitutional not to use the same allocation procedure for criminal cases. The third circuit in another well-written opinion did its best to work around what the supreme court had said in *Simpson I*, knowing full well that soon the supreme court would be elaborating on that holding in the rehearing which it had granted.[29] Having decided to take the bull by the horns and not to punt this case in the direction of the upcoming *Simpson II* decision, the third circuit gave another very insightful opinion. It held that if the supreme court in *Simpson II* was to find the method of allotment in the fifteenth judicial district unconstitutional and that that decision should be applied retroactively, any error which occurred as a result of the unconstitutionality should be considered harmless error.[30]

A harmless error under Code of Criminal Procedure article 921 is one which does not affect the substantial rights of the accused. The only substantial right in question would be the right to a fair tribunal

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27. Id.

28. State v. Romero, 552 So. 2d 45, 48 (La. App. 3d Cir. 1989), writ denied, 559 So. 2d 137 (1990).

29. Id. at 49. See State v. Simpson, 548 So. 2d 1213 (La. 1989).

30. *Romero*, 552 So. 2d at 490. The court noted that the defendant showed no actual prejudice in this case caused by the method of allotment found in the fifteenth judicial district. It seems that the third circuit is implying that the court system in the United States is based upon the presumption that the judiciary is neutral. Therefore, if the defendant has any reason to believe he will be prejudiced by having to go before any particular judge, he must file a motion of recuse. That is procedural remedy for a defendant who, for any reason, believes he is not being tried in an impartial tribunal.

with a neutral decision maker.[31] Since all courts are presumed to be fair and impartial, it would seem that no substantial right of the accused was affected and thus any error must be considered harmless. Further, the third circuit correctly opined that if the defendant thought the judge was not neutral, then he should have submitted a motion to recuse the judge. Without such a motion, nothing on the record would be able to show that the judge was not actually impartial, thus any error which may have occurred would again be harmless and should not result in a reversal of a conviction.[32]

III. *STATE v. SIMPSON*; *SIMPSON II*

Faced with mounting problems and conflicting jurisprudence on the subject, the supreme court reheard *Simpson I* and handed down an opinion which appears equitable but is nevertheless difficult to support.[33] In *Simpson II*, the supreme court held that due process of law requires capital and other felony cases to be "allotted for trial to the various divisions of the Court, or to judges assigned criminal court duty, on a random or rotating basis or some other procedure adopted by the Court which does not vest the district attorney with power to choose the judge to whom a particular case is assigned."[34] The court cited no authority for this proposition other than the right of a defendant to have a fair trial in a fair tribunal.[35]

The *Simpson II* opinion is very problematic. One problem, as the third circuit suggested several times in its line of cases on the subject, is that if a person feels he is not in a fair tribunal, he should use a motion to recuse, which is the statutory remedy for such a problem.

A second problem, if *Simpson II* is read broadly, is that the court seems to hold that it is *due process* which requires random allotment. However, such is not the case. The Louisiana Supreme Court has held that the Louisiana Constitution does not provide greater due process rights than those found in the Federal Constitution,[36] and, several federal court of appeals cases have found that lack of randomness of allotment of criminal cases does not violate the Due Process Clause of the Federal Constitution.[37] One using deductive reasoning can fairly say, therefore,

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31. This idea of a neutral detached decision maker is a creature of case law. See Wilson v. City of New Orleans, 479 So. 2d 891, 901 (La. 1985).

32. *Romero*, 552 So. 2d at 49.

33. State v. Simpson, 551 So. 2d 1303 (La. 1989).

34. Id. at 1304.

35. Id. (citing Turner v. State of Louisiana, 379 U.S. 466, 85 S. Ct. 546 (1965) as support for that position).

36. State v. Griffin, 495 So. 2d 1306, 1310 (La. 1986).

37. U.S. v. Claiborne, 870 F.2d 1463, 1467 (9th Cir. 1989). But cf. Cruz v. Abbate, 812 F.2d 571, 574 (9th Cir. 1987).

that lack of random allotment of criminal cases would not violate the due process clause of the Louisiana Constitution. Further, the selection of the judge to preside over a criminal case is purely a matter of judicial administration,[38] and the defendant has no vested rights in court procedure.[39] To infer from either constitution that a defendant has a constitutional right to have a judge picked by lot to preside over his case seems illogical. This writer is of the opinion that although a random allotment of criminal cases seems to be the more fair system, neither the Louisiana nor the Federal Constitution requires such. In light of this rationale, *Simpson II* must only be given its narrowest interpretation; that is, that while *random allotment* is not constitutionally mandated, due process nevertheless prevents the *district attorney* from allocating criminal cases to the different divisions of each district.

Simpson II says in no uncertain terms that vesting in the district attorney the power to choose the judge under which a criminal case will be heard violates due process. It also *seems* to say, when given a broad interpretation, that the allocation procedure must be random. However, *Tassin*, the earlier supreme court case,[40] may be strong support for limiting *Simpson* to a narrow interpretation. Recall that *Tassin* implied that because one always has the right to a jury drawn from the general venue, the system of non-random allotment of judges to the cases was irrelevant. The only way these two cases can be reconciled is by reading *Simpson* narrowly to say that while random allocation of criminal cases is *not* mandated by the Constitution, non-participation of the district attorney is. By this narrow approach to *Simpson*, *Tassin* remains good law and the *Simpson II* decision itself is subject to much less criticism about its overreaching effect.

IV. POST-*SIMPSON II*; THE AFTERMATH

In the wake of *Simpson II* came several cases striking down other districts' methods of allotment. First to fall was the allotment procedure found in the twenty-first judicial district in *State v. Payne*,[41] a supreme court case. After *Simpson II*, the twenty-first judicial district amended its allocation procedures. However, it still allowed the district attorney to motion the court to set a particular trial date if necessary. In *Payne*, the supreme court held that even the most modified rules do not comply with *Simpson II* if the district attorney has any discretion at all to pick

38. *Cruz*, 812 F.2d at 574.

39. State v. Clark, 340 So. 2d 208, 220 (La. 1976), cert. denied sub nom. Clark v. Louisiana, 430 U.S. 936, 97 S. Ct. 1563 (1977).

40. See supra notes 10-14 and accompanying text.

41. 556 So. 2d 47 (La. 1990).

a judge to preside over a criminal case.[42] And, the court found that the district attorney had such discretion where he had the power to make unchecked motions for certain trial dates knowing in advance which judges were to be at the bench.[43]

The supreme court in *Payne* also dispelled any thoughts that after *Simpson II*, Code of Criminal Procedure article 61, which grants the district attorney entire charge and control over every criminal proceeding in his district and the right to determine where, when, and how he shall prosecute, was unconstitutional. Rather, the court held that due process is only violated when the district attorney can in some way choose the judge before whom a criminal matter will go. Thus, Article 61 does not violate due process because it only allows district attorneys to control criminal proceedings *generally*.[44]

The next district to have its method of allotment of criminal cases struck down under *Simpson II* was the eighteenth judicial district court in *State v. Gomez*.[45] According to a per curiam opinion by Judge Marionneaux, a trial judge within the eighteenth judicial district, that district had an unpublished procedure for allocation of criminal matters. The district consists of three parishes and four divisions. Therefore, on a rotating basis, each division would sit on a felony bench in each of the three parishes and then serve the fourth term on an arraignment and misdemeanor bench for all three parishes. The judge serving as the arraignment and misdemeanor bench would confer with the district attorney six months prior to his taking the arraignment bench and, together, they would create a criminal court docket for the time he will be serving on the arraignment bench. The schedule is then submitted to the other divisions for approval. After approval, the district attorney on arraignment day moves to have each trial set for the date noticed on the proposed docket.[46] The first circuit held that this gave the district attorney control over which judge would preside over a criminal case, thus violating the mandates of *Simpson II*.[47]

The court in *Gomez* faced a tenable argument by the state that the defendant can forum shop as well as the district attorney can if the defendant chooses to move for a continuance.[48] This, in addition to a motion for recusal, is another potential statutory remedy for a defendant who feels that he is not before a neutral court. The court, however,

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42. Id. at 47-48.
43. Id. at 48.
44. Id.
45. 573 So. 2d 521 (La. App. 1st Cir. 1990).
46. Id. at 524.
47. Id. at 523.
48. Id.

did not address the argument directly, but rather glossed over it by relying per se on the *Simpson II* case.

V. *SIMPSON II*; THE FALLOUT

Surprisingly, the most recent cases in which *Simpson II* violations were alleged seem to revert back to the third circuit's logic as found in *Trahan*[49] and *Romero*,[50] and away from that found in *Simpson I* and *Simpson II*. In *State v. Kimmel*,[51] the defendant filed a pretrial motion for reallocation of the case to comply with *Simpson II*. The trial court denied the motion. The trial court also denied the defendant's motion to stay the proceeding for application for a writ to the supreme court based on the *Simpson II* ruling. The case was tried as allocated and the defendant was convicted. On appeal, the defendant alleged that he was denied due process because the allotment procedures of the fourteenth judicial district court did not comply with *Simpson II*. The third circuit refused to reverse the conviction because it found that any error which may have occurred in the allocation of the case must be harmless under Code of Criminal Procedure article 921.[52] This is because the court found that here, as in *Romero*, where the defendant has not sought to recuse the judge, then the record can show no bias and the error must be considered harmless.[53]

In *State v. Montgomery*,[54] a 1991 decision, the third circuit court again held that even if *Simpson II* is violated, when the defendant does not seek a motion to recuse the judge, the error is harmless and the conviction will not be reversed.

What does all this mean? In a nutshell, it seems that the Supreme Court of Louisiana wanted to impose a system of random allotment of criminal cases on the various districts within Louisiana or at the least to remove the power of the district attorney to have some input on the allocation procedure. However, because this is a subject of procedure which most feel is properly left to the individual districts or the legislature, subsequent courts have sought to avoid the result desired. The latest cases in effect say the defendant must file a motion to recuse or

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49. State v. Trahan, 543 So. 2d 984 (La. App. 3d Cir. 1989), where the third circuit held that the remedy for a biased tribunal is a motion to recuse.

50. State v. Romero, 552 So. 2d 45 (La. App. 3d Cir. 1989), writ denied, 559 So. 2d 137 (1990), where the third circuit held that no matter what *Simpson* actually holds, a defendant should never get his conviction overturned based on *Simpson* if he does make a pretrial motion to recuse and has it denied.

51. 571 So. 2d 208 (La. App. 3d Cir. 1990).

52. See supra notes 30-31 and accompanying text.

53. *Kimmel*, 571 So. 2d at 210.

54. 575 So. 2d 471 (La. App. 3d Cir. 1991).

else there can be no showing of prejudice and any *Simpson II* violation is harmless.

One problem with the third circuit's interpretation, however, is if the defendant does file a motion to recuse, it will likely be denied if it is only based on the fact that the case was not randomly allotted because a judge is under no obligation to recuse himself unless he has a reason to show bias against the defendant. Further, it would be ridiculous for a court to *grant* a motion to recuse based on non-random allotment yet at the same time to *deny* pretrial motions for reallotment based on *Simpson II* as the court did in *Kimmel*. If the defendant decides to seek a supervisory writ to the supreme court on a denial of a pretrial motion based on a *Simpson II* violation, the trial court need only deny any stay of proceedings request and dispose of the case; then on appeal, the court will ask if a motion to recuse was filed. If not, then its harmless error; if so, there will still likely be no error if the trial judge chose not to recuse himself based strictly upon defendant's claim that the trial judge is biased because he was not randomly chosen.

So it seems courts need only give lip service to the *Simpson II* requirements if they would rather not change their allotment procedures. Of course, the supreme court could stop this bypass of *Simpson II* by lower courts if it simply overruled *Kimmel* and held that the filing of pretrial motions for reallotment are alone sufficient to preserve the issue of bias because of lack of random allotment for appeal purposes where a motion to recuse is lacking, but as of yet they have not done so.

Of course, *Simpson II* has caused some districts to adopt an entirely random allotment procedure for criminal cases. In January of 1990, the fifteenth judicial district court, which was the district that spawned *Trahan*, *Simpson*, and several other major cases in this area, amended its allotment procedures for criminal cases.[55] Now criminal cases are fixed and assigned to *courtroom* dockets. Only when the dockets for the upcoming criminal court sessions are completed and finalized are the judges chosen by lot to sit in each designated courtroom.[56] This procedure has been approved by the supreme court in that it does comply with *Simpson II* requirements.[57]

VI. PROBLEMS WITH *SIMPSON II*

Random allotment in practice, however, causes some undesired results. Many judicial district courts had always allowed the district attorney to choose the criminal trial dates because the courts felt that the district attorney was the only one who knew about each case and how

55. Local Rules of the Fifteenth Judicial District Court.
56. Id.
57. State v. Simpson, 565 So. 2d 427 (La. 1990).

soon it needed to go to trial. The idea was that the district attorney was in the best position to set the criminal trial docket so that each defendant was assured a constitutionally required speedy and efficient trial. Further, if the presiding judge over a criminal case was immediately known, then all pretrial motions for a particular case could be heard by the same judge resulting in consistent rulings and more familiarity with the case prior to ruling on such pretrial motions.

Now, in districts where there is a random allotment of criminal cases as in the fifteenth judicial district, the district attorney loses his ability to be a watchdog over speedy trial rights. For example, if an offender is arrested for a felony violation and a bill of information is filed, under Louisiana Code of Criminal Procedure article 578, the *trial* must be commenced within two years of the date of the institution of the prosecution. The district attorney no longer has the ability to ensure that the trial is actually set on the docket to commence within that prescriptive period. All he can do is file his bill of information and hope that the trial is set on the docket in time.

Another more difficult problem to correct is where pretrial motions in a case go before a judge other than the one who will ultimately hear the case. Since in the random allotment scheme where judges rotate there is no way to determine which judge will preside over a given criminal case, any pretrial motions made prior to the random assignment of judges to a docket must go before whichever judge happens to be on the bench the day the motion goes to hearing. The result is that a judge who is unfamiliar with a case and its history must make a decision on a motion in that case. This may seem "facially fair," but it is not efficient and may lead to inconsistent results. For example, the original *Simpson* case itself, when reassigned by random allotment, went before eleven different judges in the fifteenth judicial district on different pretrial motions.[58] This means that eleven judges with different levels of knowledge of the case made rulings on the case. This is an inefficient procedure and potentially leads to inconsistent rulings.

VII. Alternative Answers to *Simpson II* Problems

What are the alternatives to the supreme court's method of imposing random allotment of criminal cases? It is this writer's opinion that the court should recant what it said in *Simpson II* and let the districts retain their authority to provide for the procedural methods within their districts as they see fit. If the district finds that the best way to ensure efficient, effective criminal dockets is to leave the allotment of criminal cases to the district attorney, so be it. One should not forget that the Louisiana

58. Id.

Supreme Court has recognized, albeit in an appendix not for publication, that the capital and felony cases involved here are going to go before a neutral jury if the defendant so desires.[59] Therefore, the randomness of the judge in a jury trial is not as important as it would be if the judge were the ultimate fact finder. The system that was in place previously worked effectively for decades; it is unfortunate that such a relatively smooth system must be disrupted because it "appears unfair."

Another possible alternative is a legislative amendment or statute providing for random allotment of criminal cases among the divisions of a given district. Although the same problems which were caused by *Simpson II* would still be prevalent initially, there would at least be a uniform procedure set up for each type of district, rotating or non-rotating, which would be open to widespread scrutiny and change. In such a case, all the districts could propose changes to the statute to benefit all until a practical workable procedure was found.

The last alternative is a different approach to supporting the *Simpson II* decision. It would seem to be an *ethical violation* under the Louisiana State Bar Association Rules of Professional Conduct[60] for a prosecutor to have control over the court's criminal docket. It appears that the district attorney, who, in essence, has the state as a client, would clearly be in violation of the ex parte communication prohibition of the rules of professional conduct[61] if he collaborated with the judiciary and set his case before a particular judge, assuming the district attorney contacted the judge or his staff concerning the docket outside of the defendant's presence. At the very least, the district attorney would appear to have a conflict of interest between his duty to the state to prosecute alleged criminal violators and his duty to the judiciary to impartially set the criminal court dockets. It is at least tenable that if the district attorney thought he may be subject to ethical violations, he would perhaps refuse to take part in acting in concert with the court to set its criminal case dockets. However, this approach may leave district attorneys afraid to vehemently pursue convictions because of possible disbarment. A prosecution which would otherwise be timely brought to trial because the district attorney would be careful to have it set on the court's docket when necessary may prescribe because of the district attorney's fear of losing his own job. Therefore, this approach to achieving the *Simpson II* results may be more harmful than beneficial.

In any event, until a uniform authoritative change is made, courts will be able to effectively avoid *Simpson II* altogether, as seen in *Kimmel*

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59. See State v. Tassin, 536 So. 2d 402 (La. 1988) and supra notes 10-11 and accompanying text.

60. See generally Louisiana State Bar Association, Rules of Professional Conduct. La. R.S. 37: Ch. 4 Appendix, Art. 16.

61. Id. at Rule 3.5(b).

and *Montgomery*, or to follow *Simpson II* to its most literal result as in *Gomez*. In either case the taxpayers and the criminal defendants are the losers. The taxpayers lose because they end up paying for the district attorneys, indigent defenders, and judges to sort this thing out time and time again. The defendants lose because they become pawns in a power struggle between the different levels of the court system and between the courts and legislature.

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